

FILED

JUL 27 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN LOPEZ-CABALLERO,

Defendant - Appellant.

No. 05-50290

D.C. No. CR-04-02842-MLH

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS and THOMAS, Circuit Judges.

Juan Lopez-Caballero appeals from the district court's judgment and 63-month sentence imposed following a guilty-plea conviction for being a deported

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

alien found in the United States, in violation of 8 U.S.C. § 1326(a) as enhanced by (b)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Lopez-Caballero contends that the district court violated his Sixth Amendment rights by imposing a sentence in excess of the 24-month statutory maximum of section 1326(a), because Lopez-Caballero did not admit his prior conviction or date of deportation. We disagree. *See Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (allowing judicial finding of a prior conviction for purposes of increasing the statutory maximum sentence); *see also United States v. Salazar-Gonzalez*, 445 F.3d 1208, 1215 (9th Cir. 2006) (rejecting defendant's contention that "enhancement was inappropriate because the government did not allege, nor did [the defendant] admit, the date of his deportation").

Lopez-Caballero also contends that the district court's reliance on *Almendarez-Torres* is misplaced because *Almendarez-Torres* has been either limited or overruled. This contention is foreclosed by our previous decisions. *See United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (noting that *Almendarez-Torres* is binding precedent until explicitly overruled by Supreme Court), *cert. denied*, 126 S. Ct. 1911 (2006).

Finally, Lopez-Caballero contends that 8 U.S.C. § 1326(b), as construed by *Almendarez-Torres*, is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This contention is foreclosed by *United States v. Pacheco-Zepeda*, 234 F.3d 411, 415 (9th Cir. 2001) (as amended) (holding that prior convictions “may continue to be treated as sentencing factors”).

AFFIRMED.